IN THE MISSOURI SUPREME COURT

JANET SUE MITCHELL and ROY G. MITCHELL	)	
Plaintiffs/Appellants	)	**Supreme Court No. SC84936**
v.	)	
SCHNUCKS MARKETS, INC.,	)	
Defendant/Respondent.	)	

On Appeal from the Circuit Court of the City of St. Louis, Missouri
Honorable Julian L. Bush
and
Court of Appeals, Eastern District

APPELLANTS' REPLY BRIEF

Respectfully submitted,
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The trial court erred in failing to limit the testimony of defendant's only witness, who was employed by defendant both at the time of trial and the time of the fall in question, and permitting defendant's employee to testify, over the objection of counsel for plaintiff, to a purported admission by plaintiff that she did not trip because such statement constituted an unsworn, oral statement by plaintiff that was never disclosed at any stage of the pretrial discovery and such testimony directly called into question the credibility of plaintiff regarding how the accident occurred and prejudiced plaintiff in the eyes of the jury.

In opening statement, counsel for defendant indicated that the employee-witness he intended to call would testify that she specifically asked the plaintiff whether she tripped and she allegedly denied that she did. (T. 11). This was the first time that this specific and crucial statement attributed to plaintiff was disclosed. Defendant takes the position that the interrogatory approved by the Circuit Court of the City of St. Louis does not seek "any statements made by the plaintiff." Respondent's Brief pg. 15. In biblical reference, this argument "strains on a gnat while swallowing a camel."[1]

Clearly the interrogatory was designed to obtain ***any statement made by the plaintiff pertaining to the facts of the incident in question***. In fact, subpart (g) instructs the responding

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[1] The court of appeals found that defendant's failure to disclose the purported statement was a violation of its discovery obligation and that it was prejudicial. It condemned as "sophistry" the argument that the interrogatory did not obligate defendant to disclose the purported admission of plaintiff.

party to:

Please attach an exact copy of the original of said statement, interview, report, file, or tape to your answers to these interrogatories; ***if oral, please state verbatim the contents.*** Defendant at no time provided a verbatim recital of what the plaintiff allegedly said as it specifically related to the accident. Defendant merely produced an accident report given by plaintiff to defendant's employee that contained a general statement that "alleges entering store and she fell on sidewalk." This statement was not inconsistent with plaintiff's testimony of how the accident occurred. But the new and refined version that was unveiled at trial was diametrically opposed to plaintiff's testimony concerning her accident.

During the trial, counsel for defendant indicated that such a statement attributed to plaintiff should not be a surprise because he asked plaintiff in her deposition whether she told anyone that she did not trip but rather just fell, which she unequivocally denied. (T. 60). Counsel for plaintiff responded by indicating that this very fact required defendant to supplement its responses if it intended to put this matter into issue by virtue of a purported admission of plaintiff to the contrary. (T. 61).

Why would a party incur the expense of taking the deposition of another party's employee solely to determine whether the employee witness intended to attribute an admission against interest to the party opposing their employer when all indications are that no such admission was made? Should not counsel be able to rely on one another to disclose that which they are clearly required to disclose with respect to statements of party opponents? Or do we want to perpetuate a system where no one can trust the other side to be forthcoming about crucial statements of party opponents? Is it reasonable to interpret the response that "***No such statement has been taken from Plaintiff.*** Plaintiff did

have a short conversation with Defendant's employee Donna Wahoff immediately after her injury. That conversation was not recorded," [Emphasis added]. (L.F. Pg. 8-9), to mean that opposing counsel must be concealing a crucial admission of the party opponent. Or rather is it reasonable to assume that, while there was a brief conversation, nothing of significance was contained in such because it would surely be so stated?

Based upon such response, counsel for plaintiff had no legitimate reason to take the deposition of defendant's employee. She did not witness the occurrence and there where photographs of the seam in question. Had defendant, however, disclosed the statement attributed to plaintiff by defendant's employee during discovery it would have become obvious that defendant was going to defend the case by essentially calling the plaintiff a liar rather than simply taking the position that the seam was not high enough to constitute a dangerous condition. The preparation for each such case is different. On the one hand your client is being accused of fraud and perjury. In such case, counsel for plaintiff would most assuredly have taken the deposition of the employee witness; possibly the depositions of other store personnel; conducted an investigation of her background and done other things to determine the veracity of her testimony in this regard.

The cases cited by Defendant deal with the failure to disclose either the identity of fact witnesses or the new opinion of an expert witness. None of these cases deal with the use of a statement as an "admission of a party opponent" to attack the credibility of a party opponent and directly controvert the testimony of an opposing party. The court in ***Fisher v. Waste Management of Missouri,*** 58 S.W.3d 523, 527 (Mo. Oct 23, 2001), clearly reveals that statements of party opponents are not to be the subject of rationalizations for springing them at trial. While the temptation

may be great to conceal an admission of a party opponent in order to unexpectedly prejudice them in front of the jury, each party is duty bound to reveal such a statement when it is requested, as it was in this case. *Id*. at 527. The fact that the ***Fisher*** opinion dealt with the worker's compensation statute does not render it inapplicable to the case at bar. The principle is the same: If a statement of a party opponent is requested and not produced, it is not admissible.

Respondent contends that plaintiff "displays a complete misunderstanding of what prejudice is at issue" by asserting that "because such testimony called directly into question the credibility of the plaintiff as to the critical facts of the case, it was prejudicial". Respondent's Brief pg. 15. Conspicuously absent from its discussion, however, is the case of ***Phillips v. American Motorist Ins. Co.***, 996 S.W.2d 584, 594 (Mo. App. WD 1999) cited by plaintiffs as support for it basis of prejudice. There the court held that where a trial court ruling affects the jury's credibility evaluation it is deemed to be prejudicial. *Id*. at 594.

Defendant alone was keenly aware that whether or not the plaintiff tripped would be a crucial issue to be determined by the jury. Defendant intended to produce affirmative evidence directly contradicting the plaintiff's testimony of what caused her to fall. Defendant, however, was not relying on direct physical evidence, an independent eyewitness, a statement contained in a medical record or some other source independent of it. Rather, it intended to do this through a purported statement of the plaintiff as recounted by its employee over whom it has direct and exclusive control and access. The failure to produce this critical statement of a party opponent against her interest in response to a direct request for such information or to supplement the discovery response pursuant to Rule 56.01(e) is a clear violation of both the letter and spirit of the applicable rules of discovery.

It should be noted that defendant does not deny that such statement was prejudicial. The only explanation that it even attempts to give for springing the purported admission at trial is that it determined that the interrogatory did not require disclosure of such. Yet it knew that it would use such statement to prejudice plaintiff in the eyes of the jury. But rather than disclose such statement and permit the parties to deal with such before trial, defendant consciously decided to wait until the trial of the case to reveal its "ace in the hole." Defendant created the situation and now wants plaintiff to suffer the consequence because she did not decide to stop the trial, just before defendant concluded its case and the court submitted it to the jury, in order to permit her to properly and exhaustively explore the matter. Since defendant intentionally created the problem should not it also bear the burden of establishing that plaintiff would not suffer any prejudice by permitting it to benefit from such conduct? Would not justice be more appropriately served by prohibiting defendant from utilizing the statement that it concealed until such time as it suited its purposes?

If this court refuses to remand the case for a new trial and prohibit defendant from utilizing such evidence, parties to litigation will have no incentive to comply with the discovery rules pertaining to statements of party opponents. They will merely wait until trial and then offer to permit the witness to be interviewed or even deposed while the jury is left to wait for the parties to do what could and should have been done long before trial commenced.

For the foregoing reasons, this court should follow the precedent established by the Missouri Supreme Court in ***Fisher v. Waste Management of Missouri***, 58 S.W.3d 523, 527 (Mo. Oct 23, 2001), and hold that the trial court committed reversible error in admitting the undisclosed statement and reverse and remand the case for a new trial directing the trial court not to admit the

undisclosed statement.

CONCLUSION

The trial court erred in failing to limit the testimony of defendant's employee-witness by precluding her from testifying that plaintiff denied having tripped when questioned by the witness because defendant failed to disclose this purported statement concerning the manner in which the accident occurred despite a request for a verbatim recital of the contents of any such statements. Plaintiffs request that the cause of action be remanded for a new trial with defendant being precluded from asserting such alleged statement by plaintiff and for such other and further relief as the court deems appropriate under the circumstances.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing in the form specified by Rule 84.06(a) and one copy in the form specified by Rule 84.06(g) were mailed, postage prepaid, by U.S. Mail, on February 10, 2003 to: Robert J. Isaacson, Attorney for Defendant, 1010 Market Street, Suite 210, St. Louis, Missouri 63101.

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RULE 84.06 CERTIFICATES

Pursuant to Rule 84.06(c) the undersigned certifies that he has complied with Rule 55.03 and that the foregoing Appellants' Reply Brief complies with the limitations contained in Rule 84.06(b) in that there are 1,985 words per the WordPerfect 6.1 word-processing system used by the undersigned, inclusive of Cover Page, signature blocks and certificates.

Pursuant to Rule 84.06(g) the undersigned certifies that the floppy disk filed herewith and prepared by the WordPerfect 6.1 word-processing system has been scanned for viruses and to the best of the undersigned's knowledge, belief and technical capacity is free from detectable viruses.

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